Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1994

COUNTY OF SAN DIEGO, ET AL.,

*Petitioners,*

v.

LOUIS SCHNEIDER,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a local government violates the Due Process Clause when, after issuing a notice and order that a public nuisance will be abated, and after providing the owner a hearing and opportunity to remove the offending items, it removes and disposes of those items in abating the nuisance.

## PARTIES

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October Term, 1994

COUNTY OF SAN DIEGO, ET AL.,

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**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners County of San Diego (hereinafter "COUNTY"), Norman Hickey, Lloyd Harmon, Lauren Wasserman, Granville Bowman, Colleen Richardson, Sue Gray, Judy Eastman, Carol Howard, and Allan Marshall respectfully pray that a writ of certiorari issue to review the amended judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on October 11, 1994.

## OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1-14) is reported at 28 F.3d 89. The opinion of the District Court (App., *infra*, 15-28) was not reported.

## JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit was originally entered on June 28, 1994. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 11, 1994, and an amended judgment and opinion was entered on that date. (App., *infra*, 1-14.) This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 United States Code section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**United States Constitution:**

**"AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY**

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . . "

**San Diego County Code of Regulatory Ordinances:**

> "Sec. 78.114. Any vehicles removed pursuant to this Division may be disposed of by removal to a scrapyard or licensed automobile dismantler's yard. After a vehicle has been removed pursuant to this Division, it shall not be reconstructed or made operable."

## STATEMENT

Petitioners were sued for damages under 42 United States Code section 1983 by Respondent Louis Schneider (hereinafter "SCHNEIDER"). The case arose from lawful nuisance abatement proceedings, which had been conducted after prior notice and hearing.

SCHNEIDER owned a 1.4 acre lot in a semi-rural, populated neighborhood. He kept over a dozen inoperable vehicles (mostly old buses) on his land. He had not moved them for many months. After public complaints, the COUNTY issued a notice of violation, ordering SCHNEIDER to remove the vehicles. SCHNEIDER did not comply. The COUNTY issued a NOTICE AND ORDER TO ABATE and declared a public nuisance based upon two types of violations: (1) the land was not zoned for vehicle storage; and (2) the vehicles were, among other things, abandoned and inoperative. (App., *infra*, 35-39.)

SCHNEIDER pursued his right to an administrative hearing. The hearing officer affirmed the NOTICE AND ORDER TO ABATE on all counts. SCHNEIDER was given another thirty days to remove the vehicles. Again,

SCHNEIDER did not comply. SCHNEIDER also failed to seek available judicial review. The COUNTY eventually abated the nuisance by causing Reybro, Inc., a contractor for the COUNTY, to remove the vehicles from SCHNEIDER's land. Reybro, Inc. eventually scrapped them.

In District Court, SCHNEIDER primarily contended that his Fourth Amendment rights were violated when COUNTY officials went on his land without warrants. After discovery, the District Court granted summary judgment to the COUNTY and its officials under Federal Rules of Civil Procedure, rule 56.[1] SCHNEIDER appealed, and the Court of Appeals for the Ninth Circuit affirmed in part (on the Fourth Amendment warrant issues which had been raised in the summary judgment motion), but reversed by finding that SCHNEIDER'S due process rights had been violated when the COUNTY failed to give SCHNEIDER notice of its intention to permanently deprive him of his vehicles. The opinion holds that "nuisance abatement was complete" when the vehicles were removed from SCHNEIDER'S land.

Section II of the opinion discusses the affirmance of summary judgment on Fourth Amendment grounds, while section III reverses on due process grounds. This petition is concerned with section III of the opinion.

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[1] A similar summary judgment motion on behalf of the contractor Reybro, Inc., et al., was also granted.

## REASONS FOR GRANTING THE PETITION

For over a century, public nuisance abatement has been guided by this Court's landmark holding in *Mugler* v. *Kansas*, 123 U.S. 623, 31 L.Ed. 205 (1887).[2] *Mugler* holds that nuisance abatement is a regulatory action within the government's police power, and not a taking of property which requires compensation to the owner.

Without *Mugler*, persons making nuisances could avoid potential losses by simply defying lawful process in nuisance abatement proceedings. Those persons could ignore lawful abatement orders while local government entities enforced them, then could spring into action (after the fact) and sue those local government entities because their possessions – the offending items which made the nuisances in the first place – were disposed of.

That is what SCHNEIDER, the maker of the nuisance, did in this case. Unless certiorari is granted and the present opinion is reversed, a basic policy recognized in *Mugler* – that makers of nuisances need not be compensated for nuisance abatement – will be significantly undermined.

By basing its result on a belabored due process argument, the present opinion sidesteps *Mugler*, but does so in a way which swallows it. Until the present opinion was published, no court had ever recognized a duty on the part of local government entities to preserve the offending items which had caused the nuisances, much less

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[2] *Mugler* was not mentioned or cited in the opinion, though the County cited and argued it to the Court of Appeals.

when enforcement of abatement orders had come after full-blown due process hearings.

The opinion effectively holds that local government entities can do nothing further with offending items once those things come into their possession, because "nuisance abatement was [is] complete" at that point. The opinion does not tell local governments what they are supposed to do with such unwanted windfalls. Whether (as here) the offending items are old vehicles – or whether they are soiled mattresses, discarded tires, broken refrigerators, or rusty drums oozing strange compounds – the opinion suggests that the offending items must be preserved indefinitely in case the owners want them back.

Apparently the only way around indefinite storage of offending items would be to initiate a new round of due process proceedings, because (according to the opinion) the first round dealt only with nuisance abatement, and "nuisance abatement was complete" as soon as the offending items came into governmental hands.

In this petition, the COUNTY contends that the Court of Appeals unreasonably limited the scope of the inherent police power recognized in *Mugler*. The opinion wrongly focuses on deprivation of the offending items to the owner – the same owner who, in this case, defied lawful abatement orders and allowed enforcement to reach the point at which he lost those items. Such a limited view unreasonably limits the inherent police power recognized in *Mugler*.

Additionally, certiorari should be granted because the opinion is in conflict with a recent Eighth Circuit

holding, *Hroch* v. *City of Omaha* 4 F.3d 693 (8th Cir. 1993), which rejected due process claims under closely analogous circumstances.

## I

## THE OPINION ANNOUNCES AN UNREASONABLE EXPANSION OF DUE PROCESS CONCEPTS

### A. The Opinion Is Inconsistent With This Court's Pronouncements On Due Process Notice Requirements.

This Court has stated:

> "The purpose of notice under the Due Process Clause is to apprise the affected individuals of, and permit adequate preparation for, an impending 'hearing.' " (*Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 56 L.Ed.2d 30 (1978).)

Under that rule, SCHNEIDER's due process rights were clearly not violated. Based on the notice to him, he could, and did, fully prepare for a hearing on the subject of nuisance abatement.

The best way to demonstrate the opinion's inconsistency with ordinary concepts of due process is to look at how due process concepts are applied to litigants in federal courts. In federal civil practice, a summons tells a defendant that relief may be taken in the manner set forth in the complaint. The complaint is sufficient if it (1) states jurisdictional grounds, (2) gives a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) demands such relief. (Fed. Rules Civ. Proc., rule 8(a).) If, for example, the subject of the suit is tortious conduct, the summons and

complaint do not need to warn the defendant that an ultimate judgment might be executed by enforcement remedies which may permanently deprive the defendant of the contents of a till, the proceeds of a bank account, and so forth. That is because notice deals with the subject of the suit, and not with ultimate enforcement consequences if the defendant loses, and then refuses to comply with lawful court orders and judgments.

### B. The Opinion Unjustifiably Creates A New Due Process Concept Of Appearing/Disappearing Notice.

The opinion backhandedly acknowledges that the COUNTY'S NOTICE AND ORDER TO ABATE had cited the Division of County Ordinances containing section 78.114, which authorized disposal of SCHNEIDER'S vehicles. (App., *infra*, 9.) The opinion is grounded, however, on the theory that SCHNEIDER'S "due process rights were violated because the COUNTY did not give him notice of its intention to deprive him of his vehicles permanently. . . . " The Court of Appeals was aware (but did not mention in the opinion) that SCHNEIDER himself had produced exhibits in District Court consisting of letters from the COUNTY stating:

> "This is your official warning that this abandoned vehicle will be removed and dismantled after fifteen (15) days from the date of this notice pursuant to the California Vehicle Code. After the vehicle has been removed, it must be dismantled and cannot be returned or made operable again. . . . "

Not all of the notices were addressed to Schneider, but that was because some of the vehicles were not registered to him as the true owner.

To get around the fact that there was indeed notice that SCHNEIDER might be deprived of his vehicles permanently, the opinion laboriously creates a scenario that the notice was somehow later limited or partially invalidated by the hearing officer – in other words, after notice appeared, it somehow disappeared.

The opinion cites no authority for this novel concept of appearing/disappearing notice. The hearing officer affirmed the COUNTY'S NOTICE AND ORDER TO ABATE in *all* respects. (App., *infra*, 32.) However, based solely on that same action by the hearing officer, the opinion inexplicably holds:

> "We hold that following the hearing officer's order the County was obligated to proceed on the theory that Schneider's vehicles were nuisances only because they were parked in violation of county zoning ordinances. Therefore, County Code § 78.114 was not applicable to Schneider's vehicles, and the citation of County Code § 78.101 in the NOTICE AND ORDER TO ABATE did not provide Schneider the notice required by due process." (App. *infra*, 13.)

The opinion never analyzes how an order which totally upheld the NOTICE AND ORDER TO ABATE somehow had the effect of limiting that same notice.

The opinion overlooks the significance of the fact that the hearing officer was conducting an administrative *appeal* of the COUNTY'S NOTICE AND ORDER TO

ABATE. SCHNEIDER specified the following reasons for appeal, and none other:

> "I desire to become a farm laborer contractor and anticipate using the busses to transport farm laborers. The busses have not been used in commercial fleet operations nor do I presently have any plans to use them in commercial fleet operations. I anticipate using the recreational vehicles to transport, feed and house farm laborers. *As funds become available I anticipate restoring the nonoperating vehicles to operational use.*" (Emphasis added.)

The opinion implies that the hearing officer should have made a specific finding that vehicles were "inoperative" to bring SCHNEIDER under ordinance section 78.114, even though SCHNEIDER'S own notice of appeal had already admitted exactly that. SCHNEIDER'S own father had testified before the hearing officer that the vehicles had not been moved or worked on at any relevant time.

The FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF ABATEMENT issued by the hearing officer contained the following paragraph:

> "1. IT IS ORDERED that: the notice and order to abate issued by code enforcement officer Allan Marshall of the Department of Planning and Land Use of the County of San Diego, dated September 26, 1989, declaring a public nuisance on the property at 2801 East Vista Way, Vista, California is hereby AFFIRMED. . . . " (App., *infra*, 32.)

The underlying NOTICE AND ORDER TO ABATE notified SCHNEIDER that he was in violation of (among

other things) San Diego County Code of Regulatory Ordinances Section 78.101. That section was fully quoted in the attachment to the notice. It provides that the unlawful storage of vehicles in an " . . . Inoperative Condition . . . Upon any Private . . . Property" is subject to " . . . Abatement of Public Nuisances. . . . " (App., *infra*, 38.)

The opinion's insupportable conclusion that the hearing officer " . . . did not make a finding that any of these vehicles were . . . inoperative," (App., *infra*, 7), is at the heart of another conclusion – equally insupportable – that the relevant portion of the pre-hearing NOTICE AND ORDER TO ABATE thereby ceased to provide notice; in other words, that the notice retroactively disappeared. Thus did the opinion find that the COUNTY violated the Due Process Clause.

This concept of appearing/disappearing notice illogically leads to the conclusion that the original NOTICE AND ORDER TO ABATE would have been sufficient if only there had *not* been a hearing, because then no one would have known how the hearing officer would have ruled. It is like holding that the notice aspect of a civil summons and complaint retroactively disappears if there is then a trial at which the plaintiff entirely wins, but the judge arguably omits findings; yet, if there had been no trial at all, there would have been no way to attack notice, and all relief could have been granted by default. In other words, there would be more due process without an adversarial hearing than with one.

The concept of appearing/disappearing notice has no precedent in due process law. It is unreasonable, it is antilogical, and it should not be allowed to survive.

## II

## THE OPINION IS INCONSISTENT WITH A RECENT EIGHTH CIRCUIT NUISANCE ABATEMENT OPINION

The present opinion is inconsistent with a recent Eighth Circuit opinion, *Hroch* v. *City of Omaha, supra,* 4 F.3d 693. In *Hroch,* the Eighth Circuit affirmed summary judgment dismissing a lawsuit brought under 42 U.S.C. § 1983 against the City of Omaha and a contractor who abated a nuisance for the City by removing the things which caused a public nuisance. *Hroch* involved structures rather than vehicles, but the underlying circumstances were otherwise virtually identical to this case. There were nuisance abatement proceedings; the owner failed to abate the nuisance; the City caused a contractor to remove the things which caused the nuisance; the owner sued under section 1983 alleging denial of property without due process because of faulty or insufficient notice. The Eighth Circuit correctly held that the City's conduct had not amounted to a deprivation of property without due process, despite destruction of the offending items. The plaintiff in *Hroch* had been in the business of demolishing buildings, so the components of the structures would presumably have had value to him, even if he had intended to demolish them himself.

The Eighth Circuit's opinion in *Hroch* and the Ninth Circuit's opinion in this case cannot be meaningfully reconciled. In both cases, owners defied lawful nuisance abatement orders made after hearings. In both cases, the ultimate consequences included destruction of the things which caused the nuisances, even though the owners allegedly valued those things. In both cases, the subject of

notices and hearings had been public nuisance abatement.

The conflict between the present opinion and *Hroch* creates an unreasonable risk for local governmental entities which may rely upon *Hroch* because of its apparent authority and obvious rightness. This conflict should be resolved by this Court.

## III

## HISTORICAL BACKGROUND – NINTH CIRCUIT CASES FINDING CONSTITUTIONAL VIOLATIONS FOLLOWING GOVERNMENTAL TOWING OR REMOVAL OF VEHICLES

The present opinion is the third published case from the Ninth Circuit since 1977 finding unconstitutional conduct related to governmental towing or removal of vehicles. Each succeeding case has relied upon thinner and more labored interpretations of constitutional principles.

The first such case was *Stypmann* v. *City and County of San Francisco* 557 F.2d 1338 (9th Cir. 1977). A San Francisco ordinance authorized removal of vehicles from streets and highways without prior notice to the owner or opportunity for a hearing. Though vehicles could be recovered by paying towing and storage fees, there was no provision to recover them by posting bond. The ordinance did not provide for a hearing before the vehicle could be sold to satisfy the lien for the towing and

storage fees. The Ninth Circuit found that the ordinance did not provide constitutional due process.[3]

The second Ninth Circuit vehicle case was *Conner* v. *City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990), cert. den., 498 U.S. 816, 112 L.Ed.2d 34 (1990). The City had declared a nuisance based on vehicles located in a fenced yard. The owners were notified of proceedings to abate the nuisance. They asked for and received a hearing. The hearing officer found for the City. Subsequently, City officials broke the fence and entered the yard without a warrant to remove two of the vehicles, which were later destroyed. The Ninth Circuit found liability under the Fourth Amendment for the warrantless entry to remove the vehicles, though a dissenter disagreed that such an entry was unreasonable, since prior notice and a hearing had been provided. (*Id.* at 1492, 1495.)[4] The *Conner*

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[3] The present opinion consistently uses the words "park," "parked," and "parking" (and no others) to plausibly cite *Stypmann* regarding special constitutional implications of the loss of use of a car. In common usage, words like "parked" are generally not used to describe a collection of unused, inoperative vehicles stored for months or years. In *Stypmann*, it was held that the loss of *use* of a car deprives the owner of a valuable property interest because:

> "A person's ability to make a living and have access to both the necessities and amenities of life may depend upon the availability of an automobile when needed." (*Stypmann* v. *City and County of San Francisco, supra*, 557 F.2d at 1342-1343.)

Such a rationale has no place in the present case.

[4] The *Conner* opinion also held, less controversially, that an initial warrantless entry to gather such things as vehicle identification numbers had been unreasonable under the Fourth Amendment.

opinion did not reach the issue of whether post-seizure destruction of the two vehicles violated due process. The *Conner* opinion has been criticized to the extent it found a Fourth Amendment violation for making a warrantless entry into a yard to remove vehicles when such removal has been authorized after notice and a hearing. To this day, the state of California has not adopted a statutory procedure for obtaining such post-hearing entry warrants for vehicle removal; probably no other state has adopted such a procedure, either. Procedures for obtaining such warrants must currently be pieced together from statutes intended for other purposes.

In the present case, the Ninth Circuit could find none of the constitutional infirmities of *Stypmann* or *Conner*, yet it again found constitutional fault in connection with governmental towing or removal of vehicles.

## CONCLUSION

The opinion effectively recognizes a new right – a due process right to have local government safely preserve the offending items which caused a nuisance – when well-settled law has never required compensation on other theories.

The opinion will foreseeably open a new era of local governmental liability. Claims can be expected from those who, in effect, invite destruction of the offending items which caused public nuisances by refusing to comply with lawful orders made after notice and hearing. The opinion protects no one who reasonably needs protection, since no reasonable person assumes that an otherwise-

valid official order to remove offending items can be ignored without risking the very items which are causing the nuisance.

For these reasons, and because the opinion conflicts with the Eighth Circuit's *Hroch* case, this petition should be granted.

Respectfully submitted,

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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|---|---|
| LOUIS SCHNEIDER,<br>*Plaintiff-Appellant,*<br>v.<br>COUNTY OF SAN DIEGO, a municipal corporation; NORMAN HICKEY, in his official capacity as Chief Administrative Officer for the County of San Diego, et al.; REYBRO, INC., a California corporation dba Quality Auto Recycling; GREGORY REYNOLDS, dba Quality Auto Recycling,<br>*Defendants-Appellees.* | No. 92-56327<br>D.C. No. CV-90-01738-MLH<br>ORDER AMENDING OPINION AND DENYING REHEARING |

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted
March 10, 1994 – Pasadena, California

Filed June 28, 1994
Amended October 11, 1994

Before: J. Clifford Wallace, Chief Judge, Jerome Farris and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Chief Judge Wallace

## SUMMARY

**Individual Rights/Civil Rights/Constitutional Rights**

The court of appeals affirmed in part a district court judgment, reversed in part and remanded. The court held that a county did not violate an individual's Fourth Amendment rights when it entered his property and removed his vehicles in order to abate a nuisance.

Appellant Louis Schneider owned a lot in a rural, agriculturally zoned part of appellee County of San Diego. Schneider did not reside on the property. Schneider parked buses, motor homes, and automobiles on the lot in an open field approximately 240 feet from the house. The vehicles were visible from a public road.

County officers determined that the vehicles were parked on the lot in violation of county zoning ordinances and that they constituted a public nuisance. The County posted a "notice and order to abate" on the property. Schneider requested an appeal hearing before the County Abatement Board. The hearing officer issued an order of abatement.

After Schneider took no action to remove the vehicles from his property, the County, through its agent, Reybro, Inc., abated the nuisance by towing the vehicles from the lot. Reybro dismantled or destroyed the vehicles and sold the remains as scrap.

Schneider sued the County and Reybro, alleging that they violated his civil rights. The district court granted summary judgment to the County and to Reybro.

Schneider appealed, contending that the County and Reybro violated the Fourth Amendment's bar against unreasonable seizures when they entered his property and removed his vehicles. Schneider also contended that his due process rights were violated because the County did not give his notice of its intention to deprive him of his vehicles permanently by allowing Reybro to dismantle them and sell the parts as scrap.

[1] The Fourth Amendment's warrant requirement applies to entries into private premises to search for and abate suspected or declared nuisances. [2] However, because Schneider did not have a reasonable expectation of privacy in the area where his vehicles were located, neither the County nor Reybro needed a warrant to enter the property. Schneider did not live in the home, and suffered no invasion of privacy. [3] The abatement hearing was sufficient to establish the validity and reasonableness of the seizure. No warrant was required.

[4] The County did not violate Schneider's due process rights when it abated the nuisance on his property by removing the vehicles. [5] However, the district court erred in granting summary judgment on the due process issue.

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## COUNSEL

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Todd D. Jones, Klinedinst, Fliehman & McKillop, San Diego, California, for defendant-appellee Reybro.

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**ORDER**

The opinion in this case, filed June 28, 1994, is amended as follows:

At slip op. 7049, first full paragraph, line 7, between "ing" and "and ordered" insert ", on the theory that the vehicles were parked on Schneider's lost in violation of county zoning ordinances,".

At slip op. 7049, second full paragraph, line 4, delete "a nuisance per se" and insert "themselves nuisances."

At slip op. 7049, second full paragraph, lines 4-9, delete beginning with "At Schneider's hearing . . . " to the end of the paragraph and insert the following:

> The hearing officer affirmed the nuisance finding pursuant to Regulatory Code § 16.210, on the theory that Schneider's vehicles were parked in violation of county zoning ordinances. This action was binding on the County and Reybro as well as Schneider. Once the vehicles were removed from the property the nuisance abatement was complete and the County was only authorized "to otherwise proceed pursuant to sections 16.212 through 16.217 of the San Diego Code of Regulatory Ordinances." These sections do not authorize the destruction of vehicles; they provide a procedure for recovering the cost of the abatement proceedings.

At slip op. 7049, delete third full paragraph.

At slip op. 7050, lines 5-8, delete from "The hearing officer . . . " to the end of the paragraph.

At slip op. 7050, delete paragraph beginning "Thus, we hold . . . " and insert the following:

> We hold that following the hearing officer's order the County was obligated to proceed on the theory that Schneider's vehicles were nuisances only because they were parked in violation of county zoning ordinances. Therefore, County Code § 78.114 was not applicable to Schneider's vehicles, and the citation of County Code § 78.101 in the NOTICE AND ORDER TO ABATE did not provide Schneider the notice required by due process. *See Mullane*, 339 U.S. at 314; *Harris*, 904 F.2d at 503. The district court erred in granting summary judgment on this issue.

At slip op. 7051, line 2, after "court." add "On remand, Schneider is free to present any state law claims contained in his complaint."

With the above amendments, the panel as constituted above has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestion for rehearing en banc is rejected.

## OPINION

WALLACE, Chief Judge:

Schneider appeals from the district court's summary judgment in favor of San Diego County, automotive tower and dismantler Reybro, Inc., with its president, Gregory Reynolds, (collectively Reybro), on his 42 U.S.C. § 1983 claims arising from the County's abatement of a public nuisance by removing vehicles from his property and destroying them. The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part and remand.

### I

In 1989, Schneider owned a 1.4 acre lot in a rural, agriculturally zoned part of San Diego County, not far from the City of Oceanside. Schneider did not reside on the property but rented out the house located on the lot. He did, however, park nine buses, two motorhomes, and two automobiles on the lot in an open field approximately 240 feet from the house. These vehicles were visible from the public road that runs in front of Schneider's lot.

After receiving a number of complaints about the vehicles, the County instituted an investigation. County officers determined that the vehicles were parked on the lot in violation of county zoning ordinances and that they constituted a public nuisance. The County was not successful in persuading Schneider to abate the nuisance

voluntarily and on September 26, 1989, it posted a NOTICE AND ORDER TO ABATE on the property. The notice stated that the presence of the vehicles on the property violated San Diego County Zoning Ordinance §§ 1006(a), 1430(b), 1430(i), 1430(j), and 6799; and County Regulatory Code §§ 21.601 and 78.101. The nuisance could be abated, the notice advised, by removal of non-operable vehicles and those not licensed to the lot address.

Schneider requested an appeal hearing before the County Abatement Board, and it was held on November 6, 1989. The hearing officer subsequently issued an order of abatement, concluding that Schneider had violated San Diego County Code §§ 1006 (applicability of zoning ordinance) and 6799 (parking of commercial vehicles in agricultural and certain other areas), and that these violations constituted a public nuisance. The order gave Schneider 30 days to abate the nuisance by "removing all vehicles" from the property. The order further provided that if Schneider did not comply, the County was authorized "to do or cause to be done whatever work is necessary to abate the public nuisance and otherwise to proceed pursuant to sections 16.212 through 16.217 of the San Diego County Code of Regulatory Ordinances." The hearing officer did not make a finding that any of these vehicles were abandoned, wrecked, dismantled, or inoperative.

Schneider took no action to remove the vehicles from his property, nor did he seek judicial review of the abatement order. On December 21, 1989, the County, through its agent Reybro, abated the nuisance by towing the vehicles from the lot. Subsequently, Reybro dismantled or destroyed the vehicles and sold the remains as scrap.

Schneider filed this action pursuant to 42 U.S.C. § 1983, alleging that the County and Reybro had violated his civil rights. He also asserted claims under California law. The parties each filed motions for summary judgment. The district court granted summary judgment to the County and to Reybro, denied Schneider's motions for summary judgment, and dismissed the action.

We review de novo the district court's summary judgment in favor of the County and Reybro. *Jones v. Union Pacific R.R. Co.*, 968 F.2d 937, 940 (9th Cir. 1992). Our tasks on appeal are to determine (1) whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact; and (2) whether the district court correctly applied the relevant substantive law. *Federal Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *cert. granted*, 114 S. Ct. 543 (1993).

## II

Schneider first argues that the County and Reybro violated the Fourth Amendment's bar against unreasonable seizures when they entered his property and removed his vehicles.

He relies on our opinion in *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 (9th Cir.) (*Conner*), *cert. denied*, 498 U.S. 816 (1990), which held that the City of Santa Ana violated the Fourth Amendment by removing a fence and entering a backyard to remove derelict vehicles that had been declared nuisances.

[1] The Fourth Amendment's warrant requirement applies to entries into private premises to search for and abate suspected or declared nuisances. *Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978); *Conner*, 897 F.2d at 1490. "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant." *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973) (internal quotations omitted); *Conner*, 897 F.2d at 1491.

One such clearly recognized exception to the warrant requirement pertains to the "open fields" doctrine. Seventy years ago in *Hester v. United States*, 265 U.S. 57, 59 (1924), the Supreme Court held that the Fourth Amendment's protection of "persons, houses, papers, and effects" does not apply to open fields. "[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver v. United States*, 466 U.S. 170, 179 (1984). Therefore, any "asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable." *Id.* (internal quotations omitted).

[2] We need not determine whether the vehicles were within the curtilage of the rented house rather than an open field. *See United States v. Dunn*, 480 U.S. 294, 301-03 (1987). Schneider did not live in the home and, having suffered no invasion of privacy, would not have standing to complain that its curtilage was invaded without a warrant. *See Maisano v. Welcher*, 940 F.2d 499, 503 (9th Cir. 1991) (*Maisano*), *cert. denied*, 112 S. Ct. 1957 (1992). Because Schneider did not have a reasonable expectation

of privacy in the area where his vehicles were located, neither the County nor Reybro needed a warrant to enter the property.

[3] Schneider argues that a warrant was necessary before his vehicles could be seized. Clearly, Schneider's vehicles were seized within the meaning of the Fourth Amendment, but they were not seized unreasonably. In *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), the Supreme Court approved an analogous warrantless seizure of automobiles, explaining,

> The seizures of the automobiles in this case took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy. In *Murray's Lessee v. Hoboken Land & Improv. Co.*, 18 How. 272 (1856), this Court held that a judicial warrant is not required for the seizure of a debtor's land in satisfaction of a claim of the United States. The seizure in *Murray's Lessee* was made through a transfer of title which did not involve an invasion of privacy. The warrantless seizures of the automobiles in this case are governed by the same principles and therefore were not unconstitutional.

*Id.* at 351-52; *see also Maisano*, 940 F.2d at 502-03. Unlike the seizures in *G.M. Leasing*, the seizures in this case were not "in satisfaction of a claim of the United States." But they were authorized pursuant to the police power of the State of California. Cal. Gov't Code § 25845 (West 1988); *City of Costa Mesa v. Soffer*, 11 Cal. App. 4th 378, 383 (1992) (*Soffer*). Because the warrantless seizure in this case did not impinge on any legitimate privacy interest, the abatement hearing was sufficient to establish the validity and reasonableness of the seizure. *See Conner*, 897 F.2d at 1491.

No warrant was required. Schneider also argues that his vehicles were seized in violation of the Fourth Amendment when Reybro destroyed them without a warrant. We do not decide the issue because Schneider raised this theory for the first time on appeal. As an appellate court, our review is limited to the record presented to the district court at the time of summary judgment. *Brogan v. San Mateo County*, 901 F.2d 762, 765 (9th Cir. 1990). We will not consider this argument.

III

Schneider next contends that his due process rights were violated because the County did not give him notice of its intention to deprive him of his vehicles permanently by allowing Reybro to dismantle them and sell the parts as scrap. Clearly Schneider has a protectable interest. "Loss of the use and enjoyment of a car deprives the owner of a property interest that may be taken from him only in accordance with the Due Process Clause." *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1342 (9th Cir. 1977); *see also Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990) (*Harris*). This principle applies to Schneider with particular force because the deprivation is permanent.

Due process requires that Schneider be given notice and an "opporunity to be heard at a meaningful time and in a meaningful manner." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987). For the notice to satisfy due process, it must "be of such nature as reasonably to convey the required information." *Mullane v. Central*

*Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (*Mullane*); *Harris*, 904 F.2d at 503.

Pursuant to San Diego County Code §§ 16.205 and 16.206, Schneider was notified that his vehicles had been declared a public nuisance. At Schneider's request, the County Abatement Board held an appeal hearing at which he presented evidence, testified, and cross-examined county officers. Subsequently, the hearing officer affirmed the nuisance finding, on the theory that the vehicles were parked on Schneider's lot in violation of county zoning ordinances, and ordered Schneider to remove his vehicles. Schneider chose to ignore the abatement order. He also neglected to seek judicial review of the abatement order, which was available pursuant to California Civil Procedure Code § 1094.5. Acting with the authority of the Board's order, the County abated the nuisance by causing Reybro to tow the vehicles.

**[4]** The County did not violate Schneider's due process rights when it abated the nuisance on his property by removing the vehicles. However, the record does not show that the vehicles were themselves nuisances. The hearing officer affirmed the nuisance finding pursuant to Regulatory Code § 16.210, on the theory that Schneider's vehicles were parked in violation of county zoning ordinances. This action was binding on the County and Reybro as well as Schneider. Once the vehicles were removed from the property the nuisance abatement was complete and the County was only authorized "to otherwise proceed pursuant to sections 16.212 through 16.217 of the San Diego Code of Regulatory Ordinances." These sections do not authorize the destruction of vehicles; they

provide a procedure for recovering the cost of the abatement proceedings.

The County and Reybro argue that because the posted NOTICE AND ORDER TO ABATE informed Schneider that he was in violation of County Code § 78.101, he was on notice that his vehicles could be disposed of pursuant to section 78.114, "by removal to a scrap yard or licensed automobile dismantler's yard." However, San Diego County Code §§ 78.101 through 78.118 and their authorizing statute, California Vehicle Code § 22660, apply only to vehicles declared to be public nuisances because they are "abandoned, wrecked, dismantled, or inoperative." San Diego County Code § 78.101; *Soffer,* 11 Cal. App. 4th at 383.

[5] We hold that following the hearing officer's order the County was obligated to proceed on the theory that Schneider's vehicles were nuisances only because they were parked in violation of county zoning ordinances. Therefore, County Code § 78.114 was not applicable to Schneider's vehicles, and the citation of County Code § 78.101 in the NOTICE AND ORDER TO ABATE did not provide Schneider the notice required by due process. *See Mullane,* 339 U.S. at 314; *Harris,* 904 F.2d at 503. The district court erred in granting summary judgment on this issue.

## IV

Schneider argues for the first time on appeal that the destruction of his vehicles was a taking without just compensation in violation of the Fifth and Fourteenth Amendments. We will not address this new argument. We

recognize that the County argued defensively in its summary judgment motion that towing Schneider's vehicles was within the nuisance exception to the takings clause. But that is not the same issue that Schneider now raises and, in any event, the district court did not address it. This issue should be resolved first, if at all, by the district court.

We also do not address the arguments raised by the County and Reybro relating to absolute and qualified immunity. The district court granted summary judgment without reaching the immunity issues. These issues should be addressed in the first instance by the district court. On remand, Schneider is free to present any state law claims contained in his complaint.

AFFIRMED IN PART AND REVERSED IN PART AND REMANDED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LOUIS SCHNEIDER,

Plaintiff,

v.

COUNTY OF SAN DIEGO, NORMAN HICKEY, in his official capacity as Chief Administrative Officer for the County of San Diego; LLOYD HARMON, in his official capacity as County Counsel for the County of San Diego; LAUREN WASSERMAN, in his official capacity as Director of Planning and Land Use for the County of San Diego; GRANVILLE BOWMAN, in his official capacity as Director of Solid Waste, a division of Public Works; COLLEEN RICHARDSON, in her official capacity as San Diego County Hearing Officer and in her individual capacity; SUE GRAY, in her official capacity as Zoning Enforcement Officer and in her individual capacity; JUDY EASTMAN, in her official capacity as Solid Waste Enforcement Officer and in her individual capacity;

No. CV 90-1738-H (LSP)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT DISMISSING ENTIRE ACTION AS TO ALL DEFENDANTS, AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed July 30, 1992)

CAROL HOWARD, in her official capacity of Compliance Officer and in her individual capacity;
ALLAN MARSHALL, in his official capacity as Abatement Officer and in his individual capacity;
REYBRO, INC., a California corporation, dba Quality Auto Recycling;
GREGORY REYNOLDS, dba Quality Auto Recycling,

Defendants.

Defendants' County of San Diego, Norman Hickey, Lloyd Harmond, Lauren Wasserman, Granville Bowman, Colleen Richardson, Sue Gray, Judy Eastman, Carol Howard, and Allan Marshall Motion for Summary Judgment, Defendants' Gregory Reynolds, Reybro Inc., dba Quality Auto Recycling's Motion for Summary Judgment, and Plaintiff Louis Schneider's Motion for Summary Judgment, all came on regularly for hearing pursuant to notice on July 20, 1992, at 10:30 a.m. before the Honorable Marilyn L. Huff, United States District Judge. The County of San Diego and County-Aligned Defendants were represented by Lloyd M. Harmon, Jr., County Counsel by Valerie Tehan, Deputy County Counsel, appearing on the motion. Defendants Gregory Reynolds, Reybro, Inc. dba Quality Auto Recycling were represented by Klinedinst, Fliehman & McKillop by Todd D. Jones, Esq., appearing on the motion. Plaintiff Louis Schneider was represented by the Law Office of Louis E. Goebel by Louis E. Goebel, Esq. and Jeffrey D. Paape Esq., appearing on the motion.

Upon review of the pleadings, evidence and arguments presented in support of and in opposition to the aforesaid motions for summary judgment and good cause appearing therefor, the Court ruled as follows:

Defendants' County of San Diego, Norman Hickey, Lloyd Harmon, Lauren Wasserman, Granville Bowman, Colleen Richardson, Sue Gray, Judy Eastman, Carol Howard, and Allan Marshall Motion for Summary Judgment, and Defendants' Gregory Reynolds, Reybro Inc. dba Quality Auto Recycling's Motion for Summary Judgment are hereby granted, by which the entire action shall be dismissed with prejudice as against all defendants. Plaintiff Louis Schneider's Motion for Summary Judgment is denied. The Court expressly incorporates the ruling orally announced in open court on July 20, 1992, into this order by reference, as though recited in full at this point.

DATED: 7-28-92

/s/ MARILYN L. HUFF
MARILYN L. HUFF, JUDGE
UNITED STATES
DISTRICT COURT

Prepared and submitted by:

LLOYD M. HARMON, JR., County Counsel
DIANE BARDSLEY, Chief Deputy

By /s/ Valerie Tehan
VALERIE TEHAN, Deputy

Attorneys for Defendants County of San Diego, Norman Hickey, Lloyd Harmon, Lauren Wasserman, Granville Bowman, Colleen Richardson, Sue Gray, Judy Eastman, Carol Howard, and Allan Marshall

Approved as conforming to court order by:

/s/ Jeffrey D. Paape
Jeffrey D. Paape, Esq.
GOEBEL & SHENSA
Attorneys for Plaintiff Louis Schneider

/s/ Donald R. McKillop Sr.
Donald R. McKillop, Sr., Esq.
KLINEDINST, FLIEHMAN & MCKILLOP
Attorneys for Defendants Gregory Reynolds, Reybro, Inc. dba Quality Auto Recycling

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| LOUIS SCHNEIDER,<br>Plaintiff,<br>vs.<br>COUNTY OF SAN DIEGO, etc., et al.,<br>Defendants. | Case No. 90-1738-H<br>San Diego, California<br>Monday,<br>July 20, 1992<br>11:10 a.m. |

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: LOUIS GOEBEL, ESQ.
JEFFREY PAAPE, ESQ.

For the Defendants: VALERIE TEHAN, ESQ.
Deputy County Counsel
1600 Pacific Highway
Room 355
San Diego, California 92101
TODD JONES, ESQ.

Transcript Ordered by: VALERIE TEHAN, ESQ.

Court Recorder: Peter Tagliaferri
United States District Court
940 Front Street
San Diego, California 92189

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

Transcriber: Mary Lou Lohr
Echo Reporting
7046 Enders Avenue
San Diego, California 92122
(619) 453-3325

[p. 1] SAN DIEGO, CALIFORNIA MONDAY, JULY 20, 1992 11:10 A.M.

(Call to order of the Court.)

MR. GOEBEL: Good morning, your Honor. Louis C. Goebel appearing on behalf of the Plaintiff, Louis Schneider.

MR. PAAPE: Good morning, your Honor. Jeff Paape appearing on behalf of Louis Schneider.

MS. TEHAN: Good morning, your Honor. Valerie Tehan, Deputy County Counsel, appearing on behalf of all county Defendants and the County of San Diego.

MR. JONES: Good morning, your Honor. Todd Jones of (indiscernible) appearing on behalf of Greg Reynolds and Reybo.

THE COURT: Thank you. Does anyone wish to be heard beyond the pleadings? Or do you wish to submit?

MS. TEHAN: Your Honor, I think that the county would be willing to submit unless your Honor has any questions.

THE COURT: Plaintiff?

MR. GOEBEL: Your Honor, I think we've been heard enough.

THE COURT: Thank you. This is cross motions for summary judgment.

The Court will grant the Defendants' motions for [p. 2] summary judgment on all claims contained in the complaint.

It is well established that the warrant requirement of the Fourth Amendment applies to entries onto private land to search for and abate suspected or declared nuisances, *Michigan vs. Tyler,* 98 S.Ct. 1942 at 1947 through 49 (1978); *Connor* [sic] *vs. City of Santa Ana,* 897 F.2d 1487 at 1490, Ninth Circuit (1990).

The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials, *Michigan,* 98 S.Ct. at 1947.

A warrant is not required in all instances, however, where the search and seizure of the property falls into well established, carefully defined classes of cases which permit warrantless searches and seizures, *Connor* [sic], 897 F.2d at 1491.

In order to establish an invasion of privacy protected by the Fourth Amendment, the Plaintiff must exhibit an actual subjective expectation of privacy in the area entered, *Smith vs. Maryland,* 442 U.S. 735 at 740 (1979).

In addition, this expectation must be one that society is prepared to accept as reasonable and therefore legitimate.

In other words, the Plaintiff must show not only [p. 3] did he have a subjective expectation of privacy, but that the individual's expectation viewed objectively was

justifiable under the circumstances, *Tapps vs. United States* (phonetic), 339 U.S. 347 at 353 (1967).

The Defendants contend that a warrant was not required because of the open field exception to the Fourth Amendment. *Oliver vs. United States,* 104 S.Ct. 1735 (1984).

In *Oliver,* the court held that an individual may not legitimately demand privacy for activities conducted outdoors in the fields because open fields do not provide the setting for those intimate activities that the amendment is intended to shelter from governmental interference, same – at 1741.

By contrast, the *Oliver* court noted that an area immediately outside the physical structure of the home may be entitled to Fourth Amendment protection if the area harbors intimate activity associated with the sanctity of a man's home and the privacies of life.

In *Oliver,* the court found that there was no reasonable expectation of privacy in open field where the property owner erected fences, posted "no trespassing" signs and planted marijuana in the secluded portion of the property.

The court noted that, even though the intrusion upon an open field is a trespass of common law, this is not [p. 4] an illegal search in the constitutional sense.

Subsequently, the Supreme Court further refined the open field doctrine in *United States vs. Dunn,* 480 U.S. 294 (1987).

Noting that potential inquiries, whether the area in question involves intimate activity normally associated

with the use of the home, the court stated that purtilege (phonetic) questions should be resolved with reference to the following factors: (1) the proximity of the area to the home; (2) whether the area is linked to the home by surrounding enclosure; (3) the nature of the uses to which the area is put; and (4) the steps taken to protect the area from observation by people walking by.

In *Dunn,* the court held that, despite the existence of a perimeter fence completely enclosing defendant's property, a barn located 60 yards from the house was not within the purtilege [sic].

The court found especially significant the fact that the barn was not being used for intimate activities of the home. See the case at 302.

Applying these factors as well as the subjective and objective expectation of privacy factors enunciated in *Smith,* the Plaintiff lacks a reasonable expectation of privacy in the field where the vehicles were stored.

While the Plaintiff's declaration indicates he had [p. 5] a subjective expectation of privacy, such an expectation is not objectively reasonable. The vehicles were located approximately 240 feet from Plaintiff's tenant's home. The property was not protected from observation by neighbors or people passing by on a major public highway.

Although the property was partially enclosed by a see-through, chain-link fence, there was no gate blocking access to the stored vehicles. The area where the vehicles were stored was not used for intimate home activities but

for the storage of vehicles. Moreover, the Plaintiff didn't live on the property.

The Plaintiff contends that *Connor* [sic] is on point with the facts of the present case and compels summary judgment in his favor. Plaintiff's reliance on *Connor* [sic], however, is misplaced.

In *Connor* [sic], the plaintiff stored several old and seemingly inoperable vehicles in their back yard. The property was completely enclosed with a tall fence that prevented public view onto the yard. Moreover, the police broke down the fence in order to tow the vehicles. There, the city did not argue that the city lot constituted an open field; rather, the city's contention was that the plaintiffs had received sufficient process and warrant – was just not required.

Notably, the court in *Connor* [sic] did not analyze [p. 6] whether or not the back yard was being used for intimate activities of the home.

The final constitutional argument raised by the Plaintiff is that he was denied procedural due process because he was denied a post-seizure hearing. This argument, however, is without merit. The Plaintiff received a pre-seizure hearing where he was afforded notice and the opportunity to be heard and to present evidence.

The fundamental requirements of procedural due process are noted [sic] and an opportunity to be heard before the Government may deprive a person of a protected property interest, *Connor* [sic], 897 F.2d at 1492.

Since the Plaintiff was provided notice and an opportunity to be heard, Plaintiff's due process rights were not violated.

In sum, the Plaintiff did not suffer any constitutional deprivations when the county entered and seized the vehicles. As such, the Defendants are entitled to summary judgment on the constitutional claims and on the trespass claims because of qualified immunity.

The issue on the remaining claim is whether the Plaintiff has a private cause of action for an alleged failure to comply with the provisions of the California Vehicle Code.

The Plaintiff contends that both the county and [p. 7] Reynolds Defendants failed to comply with the procedural and substantive provisions of the California Vehicle Code.

The Plaintiff fails to identify and analyze any legal theory that would support a cause of action for violation of the Vehicle Code. Notwithstanding, a review of the disputed statute reveals that liability will not attach to the Defendant.

California Vehicle Code Section 22660 specifically provides that the county may adopt ordinances that permit the removal of vehicles that constitute a public nuisance.

Additionally, a licensed dismantler like Reybo need not comply with the notice requirements of Section 11520 contrary to Plaintiff's assertion. See California Vehicle Code Section 22664.

Plaintiff's other alleged violations of the California Vehicle Code address an alleged requirement for a post-seizure hearing; however, for the reasons previously stated, a post-seizure hearing is not required where the Plaintiff is afforded proper notice and an opportunity to be heard at [sic] a pre-seizure notice.

As such, the Defendants are entitled to summary judgment on this claim as well.

In sum, the Defendants are entitled to summary judgment on each claim contained in the complaint.

Would you prepare the order?

[p. 8] MS. TEHAN: Yes, your Honor.

THE COURT: And would you incorporate in the order a sentence saying the Court incorporates its oral ruling as the basis for its ruling on the summary judgment?

MS. TEHAN: Yes.

THE COURT: Would you submit it to Counsel and have it submitted to the Court with Counsel's signature by next Monday?

MS. TEHAN: Yes, your Honor.

THE COURT: Thank you.

MR. GOEBEL: Thank you, your Honor.

MR. JONES: Thank you, your Honor.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Mary Lou Lohr — July 21, 1992
Transcriber — Date

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

LOUIS SCHNEIDER

v.

COUNTY OF SAN DIEGO, et al.

JUDGMENT IN A CIVIL CASE

(Filed Aug. 3, 1992)

CASE NUMBER: 90-1738-H(LSP)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Defendants' Motions for Summary Judgment is granted. Plaintiff's Motion for Summary Judgment is denied. The entire action is dismissed with prejudice as to all Defendants.

. . .

8/3/92
*Date*

DON HENDRIX
*Clerk*

/s/ John P. [Illegible]
*(By) Deputy Clerk*

**EXHIBIT "B"**

COUNTY ABATEMENT BOARD

COUNTY OF SAN DIEGO

| | |
|---|---|
| In re the Appeal of<br>LOUIS SCHNEIDER,<br>From an Order to Abate. | CASE NO. 89-435<br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF ABATEMENT |

The appeal from a Notice and Order to Abate dated September 26, 1989, issued by Allan Marshall, Code Enforcement Officer from the Department of Planning and Land Use, County of San Diego, concerning the property located at 2801 East Vista Way, Vista, California, was called for hearing on November 6, 1989, at the County Administration Center, 1600 Pacific Highway, Room 303, San Diego, California, before Colleen C. Richardson, County Hearing Officer.

Appellant, Louis Schneider, appeared personally, with his witness Louis Schneider, Sr. Allan Marshall, Code Enforcement Officer, from the Department of Planning and Land Use and Sue Gray, Principal Code Enforcement Officer from the Department of Planning and Land Use were also present at this hearing.

The Parties were sworn and testified. Appellant argues that the vehicles stored at his property do not qualify as a public nuisance.

Numerous photographs and exhibits were submitted by the San Diego County Department of Planning and Land Use. The photographs and exhibits, having been

reviewed by the appellants with no objection thereto, were received into evidence.

Having considered all evidence as well as the regulatory and zoning ordinances appellant has been charged with violating, the following findings of fact, conclusions of law, and order of abatement is made;

## FINDINGS OF FACT

1. The Notice and Order to Abate was posted on the property at 2801 East Vista Way, Vista, California, in a manner most likely to give actual notice to the owner and person in possession of the property on September 26, 1989, at which time it was also mailed to appellant.

2. Appellant responded to the Notice and Order to Abate by filing with Clerk of the Board of Supervisors, on or about October 6, 1989, an appeal.

3. The Clerk of the Board of Supervisors notified the parties in writing of the hearing date, time and location at least ten (10) days before the hearing on November 6, 1989.

4. A hearing was held November 6, 1989, wherein the representatives of the County of San Diego appeared and presented evidence; appellant likewise appeared and presented evidence.

5. The record owner of the property located at 2801 East Vista Way, Vista, California, is Louis Schneider.

6. Louis Schneider is responsible for the facts alleged in the Notice and Order to Abate.

7. The vehicle stored on the subject property are commercial vehicles as defined in Vehicle Code Section 260.

8. It has been physically possible and feasible to correct the conditions as set forth in the Notice and Order to Abate, issued September 26, 1989.

## CONCLUSIONS OF LAW

1. The Notice and Order to Abate were served as required by law.

2. The Clerk of the Board of Supervisors notified the parties in writing of the date and location of the hearing held on November 6, 1989, as required by law.

3. Louis Schneider is the owner of the subject property located at 2802 East Vista Way, Vista, California.

4. The violations set forth within the Notice and Order to Abate, specifically violation of Sections 1006 and 6799 of the San Diego County Code which were declared a public nuisance by the Code Enforcement Officer, do exist.

5. Said violations set forth in Conclusion 4 above constitute a public nuisance pursuant to San Diego Ordinance Section 7141 (New Series) and Louis Schneider is subject to the Uniform Public Nuisance Abatement proceeding contained in chapter 2 of division 6, title 1 (commencing with Section 16.201) of the San Diego Code of Regulatory Ordinances.

6. Considering all of the evidence, the history of the violations, the feasibility of correcting the violations, and

the necessity for a prompt correction of the violations in view of the detriment to the neighborhood and citizens caused by such violations, a reasonable period of time has been given to Louis Schneider to correct the violations set forth in Conclusion 4 above.

NOW THEREFORE, based on the above Findings of Fact and Conclusions of Law, and good cause appearing therefore,

1. IT IS ORDERED that: The Notice and Order to Abate issued by Code Enforcement Officer Allan Marshall of the Department of Planning and Land Use of the County of San Diego, dated September 26, 1989, declaring a public nuisance on the property at 2801 East Vista Way, Vista, California is hereby AFFIRMED;

2. IT IS FURTHER ORDERED that: Louis Schneider shall comply with the order to Abate issued September 26, 1989, and shall do or cause to be done all things necessary to bring the property in compliance with all of the requirements of sections 1006 and 6799 of the San Diego County Zoning Ordinance and Code of Regulatory Ordinances by removing all vehicles, and doing all things necessary to cure the defects which form the basis of the Public Nuisance so declared to the satisfaction of the Code Enforcement Officer of the Department of Planning and Land Use within thirty (30) calendar days from the date this order is mailed to Appellant.

3. IT IS FURTHER ORDERED that: If appellant fails, neglects, or refuses to fully comply with the Order set forth in paragraph 2 above on or before the date specified therein, the County Abatement Officer shall, and is hereby authorized, to do or cause to be done whatever

work is necessary to abate the public nuisance and otherwise to proceed pursuant to Sections 16.212 through 16.217 of the San Diego County Code of Regulatory Ordinances.

4. The appropriate law enforcement agencies are hereby directed to assist officers of the Department of Public Works, Department of Planning and Land Use, Zoning Enforcement in gaining entrance to said property to effectuate the within order and to abate the declared nuisance.

5. THE PARTIES ARE FURTHER ADVISED that:

(a) This Findings of Fact, Conclusions of Law and Order of Abatement is final the date it is filed with the Clerk of the Board of Supervisors;

(b) The time within which judicial review of this decision must be sought is governed by Code of Civil Procedure Section 1094.6, which has been made applicable in the County of San Diego by San Diego County Code Section 11.120. Any petition or other paper seeking judicial review must be filed in the appropriate court not later than the ninetieth (90th) day following the date on which this decision becomes final; however, if within ten (10) days after the decision becomes final, a request for the record of proceedings is filed and the required deposit in an amount sufficient to cover the estimated cost of preparation of such record is timely deposited, the time within which such petition may be filed in court is extended to not later than the thirtieth (30th) day following the date on which the record is either personally delivered or mailed to the party, or his attorney of record, if he has one. A written request for the preparation of the

record of the proceedings shall be filed with the Clerk of the Board of Supervisors, Room 402, County Administration Center, 1600 Pacific Highway, San Diego, California; 92010; and

(c) Nothing in this paragraph concerning the time frame for appeal shall extend or delay the time for compliance with this Order.

DATED: 11/10/89

/s/ Colleen C. Richardson
COLLEEN C. RICHARDSON
County Hearing Officer

**EXHIBIT A**

[SEAL] COUNTY OF SAN DIEGO

[X] Department of Public Works
5454 Ruffin Road
San Diego, California 92123

[X] Department of Planning & Land Use
5201 Ruffin Road, Suite B
San Diego, California 92123

[ ] Department of Health Services
1700 Pacific Highway
San Diego, California 92101

Name Louis Schnieder Case No. 89-435
Address 510 N. Pacific St., #4
City and Zip Oceanside, CA 92054

NOTICE AND ORDER TO ABATE

**NOTICE IS HEREBY GIVEN** that See attached 1(a) through 1(d) is in violation of Section see attached 2 of the San Diego County Code. The violation has been declared a public nuisance by the Code Enforcement Officer and must be abated immediately. The public nuisance is on property located at 2801 East Vista Way, Vista, CA 92080.

**YOU ARE HEREBY ORDERED TO ABATE SAID PUBLIC NUISANCE** within Ten (10) consecutive calendar days from the issuance of this order. The issuance date is specified below. You may abate the nuisance by See attached (3). If you fail to abate the public nuisance within the number of days specified, the County may order its abatement by public employees, private contractor, or other means, and the cost of said abatement may

be levied and assessed against the property as a special assessment lien or billed directly to the property owner.

**YOU MAY APPEAL FROM THIS ORDER OF ABATEMENT** but any such appeal must be brought prior to the expiration of the number of days specified above for completion of abatement. The appeal must be in writing; specify the reasons for the appeal; contain your name, address and telephone number; be accompanied by an appeal fee of Five hundred dollars ($500.00); and be submitted to the Clerk of the Board of Supervisors at the following address:

Clerk of the Board of Supervisors
County of San Diego
1600 Pacific Highway, Room 402
San Diego, CA 92101
Tele. No. (619) 236-2321
ATTN: Chief Deputy Clerk

One who is legally indigent may obtain a waiver of the appeal fee. Upon timely receipt of the appeal and accompanying fee, or waiver, the Clerk of the Board will cause the matter to be set for hearing before a county abatement board and notify you of the date and location of the hearing.

If you have any questions regarding this matter, you may direct them to the county officer issuing this notice at the address or telephone number listed below.

ISSUANCE DATE: September 26, 1989

| | |
|---|---|
| Name | Allan Marshall |
| Title | Code Enforcement Officer |
| Address | 5201 Ruffin Road |
| Telephone | (619) 694-3741 |

Schnider
September 26. 1989
Case # 89-435

A.P.N. 170-112-02-00
2801 East Vista Way
Vista, CA 92083

1. (A) The storage of commercial fleet busses on agriculturally zoned property, as defined in Section 1430(b).

   (B) The storage of nonoperating vehicles on agriculturally zoned property, as defined in Section 1430(i).

   (C) The storage of recreational vehicle(s) on agriculturally zoned property, as defined in Section 1430(j).

   (D) The parking of commercial vehicles in excess of one (1) ton on private property in an agtriculturally [sic] zoned area, as defined in Section 6799.

2. San Diego Zoning Ordinance violations

   (A) 1006(a) General applicability, as described in Sections 2700 – 2705 – Limited Agricultural Use Regulation(s), by the Unlawful Storage of Commercial, Recreational and nonoperational vehicles.

   (B) 1430(b) Fleet Storage. Storage or Parking of one (1) or more vehicles used regularly in business operations.

   (C) 1430(i) Storage of Nonoperating vehicles.

   (D) 1430(j) Storage of Recreational Vehicles and Boats.

   (E) 6799 Parking of Commercial Vehicles in Residential and Agricultural Zones in Excess of one (1) ton.

(F) County Regulatory Code Section 21.601 Junk, Automobile Wrecking and nonoperating vehicle Storage Yard, as described in Section 21.601(b) in Section 21.601(b)

(G) County Regulatory Code Section 78.101 Abatement of Public Nuisances – Abandoned Vehicles, as described in Section 78.117, The Unlawful Abandonment of Storage, Parking, Leaving of Any Licensed and Unlicensed Vehicles in a Wrecked, Dismantled or Inoperative Condition Upon any Private or Public Property.

3. (A) Removal of auto vehicles that are nonoperable, not currently licensed to said address, and street legal and safe to operate on streets and highways.

(B) Removal of all recreational vehicle(s) that is not currently registered to said address. Discontinue the occupational of amy [sic] recreational vehicle.

(C) Removal of all buses from said property.

DISTRIBUTION

Original: – Posted on property
Copies: – Louis Schnider (R)
– Louis Schnider, tenant
– Clerk of The Board
– Carole Howard, Department of Public Works
– File, Department of Planning and Land Use

(R) Certified, return receipt

DPLU Case No. 89-435

I certify that this is a true copy of the Notice and Order to Abate in the above referenced case.

/s/ Allan Marshall
ALLAN MARSHALL
Code Enforcement Officer I